Petition

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Appellee,

v.

AMADIO PETITO,

Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statement of the District Court, at the time of the commission of the contempt, failed to properly give notice of the possibility of a criminal contempt or misled Petito into believing that the only consequence of his refusal to testify was civil sanctions?

2. Whether the imposition of criminal contempt sanctions long after civil sanctions had proved effective violates the standards set forth in *Shillitani v. United States,* 384 U.S. 364 (1966)?

3. Whether the loss by the government of the surveillance report of the sole witness to Petito's presence at the social club denied Petito due process of law?

4. Whether the failure of the trial court to grant Petito discovery of the supporting papers of a wiretap order and his request for a hearing denied him effective assistance of counsel and due process of law?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

UNITED STATES OF AMERICA,
Appellee,

v.

AMADIO PETITO,
Defendant-Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The opinion of the Second Circuit affirming an order of the District Court (Costantino, J.) is set forth in the appendix at 9a.

The opinion of the District Court (Costantino, J.) is set forth in the appendix at 1a.

JURISDICTION

The order denying Petito's petition for rehearing was entered on March 10, 1982. This petition is timely filed. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[1]

This case involves the Fourth Amendment; the due process clause of the Fifth Amendment to the United States Constitution; the right to counsel provision of the Sixth Amendment to the United States Constitution; the Jencks Act, 18 U.S.C. §3500; and 18 U.S.C. §2515 *et. seq.*

PROCEDURAL HISTORY

Amadio Petito was charged with one count of perjury and one count of criminal contempt. After a jury trial, he was convicted and on August 14, 1981 sentenced to four years incarceration. He appealed his conviction, which was affirmed by the Second Circuit. After the affirmance, he filed a petition for rehearing with a suggestion for rehearing en banc which was denied on March 10, 1982.

INTRODUCTORY STATEMENT

This case requires Supreme Court review. The first issue raised, relating to the statements made at the time of the criminal contempt proceedings, involves a clear conflict in the circuits. The Ninth Circuit in *Yates v. United States,* 227 F.2d 848 (9th Cir. 1955) and *Daschbach v. United States,* 254 F.2d 687 (9th Cir. 1958) holds that, in order to avoid misleading a potential criminal contemnor into thinking that the only consequences of his acts would be civil sanctions, the court must give positive notification of the criminal contempt charge at the time of the refusal to answer as a predicate to punishment for criminal contempt. The Second Circuit, in this case, rejects such a rule.

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1. The text of these provisions and statutes are set forth in the appendix as Appendix E (25a).

The second issue raised, deals with an apparent violation of this Court's statement in *Shillitani v. United States,* 384 U.S. 364 (1966). In *Shillitani,* this court stated that criminal contempt should be resorted to only after civil sanctions have been ineffective. Here, the criminal sanctions were imposed long after Petito was induced by the civil sanctions imposed to testify before the grand jury. In fact, Petito testified within thirty days of being held in civil contempt and was not indicted until almost two years later.

The third issue raised involves the negligent loss of the surveillance report of Officer Dunn as to his observations that Petito was at a certain location on May 4, 1978. Petito's denial that he was there on that date was the only alleged perjurious answer. Dunn was the sole witness to this event called by the government and he was testifying some two years after he made his observations. Despite the Second Circuit's statement that no request to produce this report was made at trial, the record clearly shows that during cross-examination of Dunn, when it was learned for the first time that he had made such a report, counsel requested: "May I see a copy of it since I am entitled to it?" Further, the prosecutor understood that this was a request for production since she stated that she did not have it but would look for it.

The fourth issue raised relates to the constitutionality of the Second Circuit's interpretation of 18 U.S.C. §2515 and 2518(10) holding that a target of a wiretap has no discovery rights regarding that wiretap, when the fruits of that wiretap are used at a criminal contempt trial. *United States v. Morales,* 566 F.2d 402 (2d Cir. 1977). *Morales* holds that once facially validity of the wiretap is made, no further discovery as to the wiretap is permitted. The theory being that the trial of the contempt is part of the original grand jury proceedings. Thus, under the Second Circuit rule, the fruits of a potentially illegal wiretap can

be used at a criminal contempt trial held, as here, after indictment and some two years after the asserted contempt. Even if this strained interpretation were correct, which it is not, it still is in conflict with the Fourth Amendment and the exclusionary rule.

STATEMENT OF FACTS

A. The Contempt Charge

The minutes of Mr. Petito's appearance before the Grand Jury on July 20, 1979 were read into the record by the Government (55).[2] The substance of the Grand Jury proceedings were as follows: Upon being asked questions concerning Samuel Cavalieri and Local 29, Mr. Petito refused to respond to those questions and invoked his Fifth Amendment right against self-incrimination and requested immunity from prosecution based on his testimony (56). He further refused to answer any questions that were derived from information received through any illegal electronic surveillance. *Id.*

The minutes of Mr. Petito's second appearance before the Grand Jury on July 20, 1979, that occurred subsequent to Mr. Petito's being granted immunity, were also read into the record by the Government (58). Mr. Petito continued to assert his Fifth Amendment privilege in responding to most of the questions posed to him and declined to answer the remaining questions on the ground that they were derived from information received through any illegal electronic surveillance (59-60).

Mr. Harmon, the Assistant United States attorney who conducted the examination before the Grand Jury, advised Mr. Petito that Mr. Petito could not assert his Fifth Amendment privilege and that Petito would be

2. References are to the trial minutes.

brought before Judge Bramwell who would direct Petito to respond to questions before the Grand Jury (60). Harmon further advised Petito that Petito's continued refusal to answer in defiance of Judge Bramwell's directive, would result in Petito's being held in contempt and incarcerated until Petito did answer the questions. *Id.*

The minutes before Judge Bramwell on July 20, 1979, reflect that Judge Bramwell signed an Order that directed, and he so directed, Petito to answer those questions that were asked of him before the Grand Jury (62-65).

After being informed by Petito that he would not testify before the Grand Jury (65-66), Judge Bramwell found Petito to be in contempt of court and further stated that:

> You are to be remanded immediately, and you will be remanded for the life of the Grand Jury, which is presently sitting, for at such time as prior to that, as you may purge yourself of contempt. You may purge yourself at anytime by agreeing to testify before the Grand Jury to the questions propounded to you.
>
> THE COURT: And at this time you are remanded by the Court and are to be held in custody for the life of the Grand Jury, or prior to that at such time as you may purge yourself of contempt by testifying before the Grand Jury. (66)

Petito did appear and testified before the Grand Jury on August 16, 1979 (72).

James D. Harmon, special prosecutor for the Department of Justice, testified concerning the function of the particular Grand Jury before which Mr. Petito appeared (70-71).

In the course of Mr. Harmon's testimony, most of the Grand Jury minutes of August 16, 1979 were read to the jury (78-146). These minutes contained a large number of

questions which were based upon communications seized pursuant to a wiretap. In fact, many of the questions are direct quotes from the intercepted communications.

Mr. Harmon then related the events during Mr. Petito's August 27, 1979 appearance before the Grand Jury (162).

The portion of the Grand Jury minutes that contained the alleged perjurious answer was read into the record and is as follows:

> Q. Yes. Did you go to the Social Club of Samuel Cavalieri?
>
> A. Yes. I thought about it and I remember that I did not go there.
>
> I thought about it and I remember that I did not go there. I mentioned to you that it was a possibility that if I did go to 109th Street it was a question of seeing my father who was alive at the time.
>
> But remembering after I left here, I had met my father outside of where we had this election, the Mozart Hall. I remember meeting him and after the meeting and that's why I am saying now that I never went to 109th Street.
>
> Before I answered there was a possibility that I did or didn't. More or less the reason was to see my father, but I remember seeing my father outside of the election.
>
> Q. So then it is your testimony that you did not go to Samuel Cavalieri's social club on 109th Street?
>
> A. On the night of the nomination meeting, no sir. (166)

The Government then read into the record the balance of the August 27, 1979 Grand Jury minutes (167-229). Again, many of the questions asked were directly taken from intercepted communications.

William Dunn, a Special Investigator for the Nassau County District Attorney's office, testified that, on the evening of May 4, 1978, he was conducting a surveillance

operation at Second Avenue between 109th and 110th Streets in New York City (297). Mr. Dunn had been provided with a description of Sonny Petito, which was that Mr. Petito was 5'7", approximately 175 pounds, stocky and bald and clad in work clothes (298-307). At about 8:00 p.m., Mr. Dunn observed a man, whom he identified in court as Sonny Petito, cross Second Avenue and enter a social club on that block (298-99). Louis Sanzo and Samuel Cavalieri also entered the club at approximately the same time (300). After seeing the three individuals mentioned above emerging from the social club, at about 8:40 p.m., Mr. Dunn instructed a photographer to take pictures of those people (300-301). Mr. Dunn further testified that he had had another opportunity to observe Mr. Petito on July 6, 1978 (305).

In responding to the question whether he was able to identify Mr. Petito from only the brief observation on May 4, 1978, Mr. Dunn stated:

> "No. When I saw the photographs on July 6th, then I knew it was the same individual that I had seen." (318)

The only record that Mr. Dunn made of his surveillance activities of May 4th, 1978 was a report that he wrote the following day (311). This report and the negatives of the photographs taken that evening were given to the Organized Crime Strike Task Force in the Eastern District (311-12). The Assistant United States Attorney did not produce either the report or the negatives, despite a request by counsel for them.[3]

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3. After counsel asked to see a copy of the report (311), Ms. Brevetti stated that these materials were not in her custody but, that she would look for them (311-312).

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT SHOULD GRANT THE WRIT AND RESOLVE THE CONFLICT BETWEEN THE NINTH AND SECOND CIRCUITS AS TO WHETHER THE DUE PROCESS CLAUSE REQUIRES THAT A CIVIL CONTEMNOR BE ADVISED OF THE POSSIBILITY OF A CRIMINAL CONTEMPT CHARGE AT THE TIME HE IS ADVISED OF THE IMPOSITION OF CIVIL SANCTIONS.

Amadio Petito was subpoenaed to appear before a United States Grand Jury as a witness in an investigation of the affairs of Local 29, of the Drillrunners and Blasters Union.

Petito refused to testify on grounds that to do so would violate his privilege against self incrimination under the Fifth Amendment to the United States Constitution and that the questions to be asked were formulated from illegally intercepted communication. On or about July 20, 1979, Petito was granted immunity pursuant to 18 U.S.C. §6002. Despite the grant of immunity, Petito still refused to answer any questions put to him.

In the Grand Jury, Petito was advised by the government, that in light of the Order of Immunity, he had to answer the questions posed and that he could not further assert the (C5)[4] privilege against self-incrimination. The government also advised Petito that "If you refuse to obey Judge Bramwell you may summarily be held in contempt and incarcerated until such time you choose to answer the questions; do you understand that?" (C5).

Later the same day, Petito was brought before Hon. Henry Bramwell. The government requested that the District Court "hold Mr. Petito in contempt of Court and

4. References to the contempt proceedings of July 20, 1979 will be designated "C".

to incarcerate Mr. Petito for the purpose of compelling him to answer questions before the Grand Jury." (C3).

The minutes of Petito's refusal to testify in the Grand Jury were read to Judge Bramwell, who then ordered Petito to answer the questions asked in the Grand Jury. Petito continued to refuse to answer (C5-6). Judge Bramwell then stated:

> I find you to be in contempt of Court, and based on the finding you are to be remanded immediately, and you will be remanded for the life of the Grand Jury, which is presently sitting, for at such time as prior to that, as you may purge yourself of contempt. You may purge yourself at any time by agreeing to testify before the Grand Jury to the questions propounded to you. (C6).
>
> ***
>
> And at this time you are remanded by the Court and are to be held in custody for the life of the Grand Jury, or prior to that at such time as you may purge yourself of contempt by testifying before the Grand Jury (C7).

At this point, Judge Bramwell signed the order of contempt.

On or about August 16, 1979, Petito purged himself of the contempt and testified before the Grand Jury (72).

Prior to trial, Petito moved to dismiss the contempt charges on the ground that the statements of the District Court on July 20, 1979 informing him that his failure to testify was a contempt of court which would be purged by his subsequently testifying, denied him due process of law. The motion was denied,[5] before trial and when renewed after the government's case, the entire case, and after the verdict.

It is Petito's position that the affirmative statements made by the District Court on July 20, 1979, to the effect

5. The opinion denying the motion is set forth in the appendix at

that he would be held in jail on his contempt until he purged himself by testifying, were such that one would naturally imply that the contemporaneous action (i.e. the civil contempt) was the only consequence of the refusal to testify.

In *Yates v. United States,* 227 F.2d 848 (9th Cir. 1955), the court was faced with a virtually identical situation. There the Court states:

> But, while coercion is applied, the defendant in the criminal case is entitled to know he may yet be subjected to a definite penalty for contempt and that the coercive restraint is not intended to relieve him of the punishment for criminal refusals which he has already uttered.
>
> ***
>
> If then the record had shown a definite notification to defendant at an appropriate time, the coercive and punitive sanctions might have been successfully applied. But the concept of due process of law is an additional safeguard. The notions inherent therein will not permit, without prior positive notification, what otherwise might be viewed as the indefinite confinement of a defendant in a criminal case pending his submission as a witness to authority, and then when imprisonment has no effect, the punishment of the refusal of obedience by incarceration for a term of years. *Id.* at 850-851.

In *Yates,* the Ninth Circuit fashioned a rule requiring positive notification of the criminal contempt charge at the time of the refusal to answer as a predicate to punishment for the criminal contempt. *Daschbach v. United States,* 254 F.2d 687 (9th Cir. 1958); See, *United States v. Abascal,* 509 F.2d 752, 755 N.3 (9th Cir. 1975).

The concurring opinion in *Daschbach,* suggests an additional factor before applying the rule; that the trial court must make some affirmative statement from which

the defendant would naturally imply that the civil contempt was all that was at issue. *Id.* at 693.

While no other Circuit has apparently dealt directly with the *Yates* situation, in *United States v. Seale,* 461 F.2d 345, 366 (7th Cir. 1972), the Seventh Circuit distinguishes that case from *Yates* and *Daschbach* on the ground that Seale had not shown that anything the court had said or done could have led him to believe there would be no further penalty for his conduct. Thus, it appears that the Seventh Circuit would follow *Yates* where, as here, the court handling the contempt says or does something to lead defendant to believe that the civil penalties were all he was facing for his acts.

The trial court indicated that the issue here was whether notice was given in accordance with F.R. Crim. P. 42(b). After framing the issue in these terms, the court found that sufficient notice was given because: 1) Ignorance of the law is no defense; 2) counsel for Petito should have known and advised Petito of the criminal contempt; and 3) the indictment gave notice. The Second Circuit's opinion also phrases the issue as one of pre-indictment notice. Neither opinion deals with the crucial issue of the impact of District Court's statements regarding the purging of the civil contempt.

First, the *Yates* rule, requiring notice of the possible criminal contempt as a predicate to prosecution for criminal contempt should be adopted. The *Yates* rule comports with the doctrine that "a court must exercise '[t]he least possible power adequate to the end proposed'. *Anderson v. Dunn,* 6 Wheat. 204, 231 (1821); *In re Michael,* 326 U.S. 224, 227 (1945)". *Shillitani v. United States,* 384 U.S. 364, 371 (1966).

> This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The Judge should resort to

criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.[6] 384 U.S. at 371, n. 9.

In re Irving, supra at 1037. See also, ABA Standards for Criminal Justice, second edition 1980, Standard 6-4.2 (Special Functions of the Trial Judge; Use of the Contempt Power, Admonition and Warning).[7]

Further, requiring notice would not place a heavy burden on a court and would greatly reduce, if not remove, the possibility of any misleading statements being made by the court from which a contemnor could incorrectly imply that all he was facing was civil contempt.

Second, even if this Court does not wish to adopt the strict notice rule of *Yates,* it is respectfully submitted that the *Yates* rule apply where statements or actions of the Court are such that one could reasonably be misled as to the consequences of his act. Here, Petito was specifically

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6. In Petito's case, the civil sanctions were effective, for less than a month after he was civilly incarcerated, he agreed to and did testify in the Grand Jury. The criminal contempt charges were first brought almost two years later. To impose criminal sanctions long after civil sanctions have led to a purging of the contempt flies in the face of the pronouncements in *Shillitani, supra* and *In re Irving,* 600 F.2d 1027, 1037 (2d Cir. 1979) *cert. den.* 100 S.Ct. 137. See Point II, *supra.*

7. Standard 6-4.2 states:

No sanction other than censure should be imposed by the trial court unless:

***

(b) the conduct warranting sanction was preceded by a clear warning that such conduct was impermissable *and that specified sanctions* might be imposed for its repetition. (emphasis supplied).

informed that he could purge himself of the contempt by testifying. Clearly, in the context of a civil and criminal contempt proceeding, such statements are misleading.

For the reasons set forth above, this Court should grant the writ to resolve the conflict between the circuits.

POINT II

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE IF THE IMPOSITION OF CRIMINAL CONTEMPT SANCTIONS AFTER CIVIL SANCTIONS WERE EFFECTIVE VIOLATES THE STANDARD SET FORTH IN *SHILLITANI v. UNITED STATES*, 384 U.S. 364 (1966).

Petito was held in civil contempt on July 20, 1979. On August 16, 1979, Petito purged himself of the contempt and testified in the Grand Jury. Almost two years later, Petito was charged with criminal contempt relating to the same refusal to answer as was the subject of the civil contempt.

In his brief to the Circuit Court, Petito raised the issue of whether the imposition of criminal sanctions under these circumstances violated the standard of *Shillitani v. United States, supra.* Appellant's brief p. 26, N*. So too, in his reply brief Petito states:

> As to Petito's argument that to impose criminal sanctions long after civil sanctions have succeeded flies in the fact of statements made by the Supreme Court . . . and by this Court . . . App. Reply Brief, p. 12.

Despite, this clear raising of the issue, albeit without a separate heading, the Second Circuit did not decide this issue on the merits.[8] This issue was again raised in a peti-

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8. The Second Circuit held the issue was not raised.

tion for rehearing and the argument was again set forth. The petition was denied. Under any fair analysis of the record, this issue was raised and should be decided.

In *Shillitani,* as well as in *In re Irving, supra,* and *United States v. Morales,* 566 F.2d 402 (2d Cir. 1977), the courts have stated that:

> This doctrine [that a court must exercise the least possible power adequate to the end proposed] further requires that the trial judge first consider the feasibility of coercing testimony through civil contempt. The Judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate. 384 U.S. at 371, N.9.

In re Irving, supra at 1037. See also, ABA Standards for Criminal Justice, second edition, 1980, Standard 6-4.2.

Thus, the imposition of Criminal sanctions here long after the success of civil sanctions was improper.

POINT III

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE IF THE LOSS BY THE GOVERNMENT OF CERTAIN EVIDENCE DENIED PETITO DUE PROCESS OF LAW AND A FAIR TRIAL.

Petito was charged with having lied to the Grand Jury regarding whether he had been at a meeting on May 4, 1978 at the social club of Sam Cavalieri.

Prior to trial, Petito was informed that he had been the subject of surveillance at the social club on May 4, 1978. Petito requested that any surveillance photograph or negatives be supplied.

Counsel was informed that none of these items were available, and that a check of Nassau County was made,

but the items could not be located (minutes of June 29, 1981 p. 7-8).

At trial, the only witness to Petito's presence at the social club on May 4th was William Dunn, a special investigator for the Nassau County District Attorney's office. Dunn testified that he was assigned to surveil a social club at Second Avenue between 109th and 110th Streets (296-297). Prior to that night he had been told of Petito's name and was given a general description that Petito was about five-seven, stocky and bald (298, 308). Dunn had never seen Petito before that night (306). At approximately 8:00 p.m.,[9] he saw Petito cross Second Avenue and enter the club. At about 8:40 p.m. Petito, in the company of Sanzo and Cavalieri, left the club (298-299). Dunn testified that a photographer was with him that night and had taken pictures at his direction. Further, Dunn had seen these photos and negatives but they were of poor quality (300, 301, 312). Several months after this surveillance, on July 6, 1978, Dunn saw Petito at a restaurant and identified him as the same man he had seen back on May 4, 1978 (302-305).

On cross examination, it was brought out that Dunn was near sighted.[10] Dunn had only gotten glasses a year

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9. The sun had set at 7:55 p.m. on the 4th (327) but Dunn insisted that when he first saw Petito at 8:00 p.m., it was light out and that he had no problem seeing Petito (314).

10. In fact, he was squinting as he testified (312). The identification of Petito was made from some fifty yards by the use of hand held binoculars (313-314). After May 4, 1978, other than seeing Petito on July 6, 1978, Dunn did no further work on the case (321). Therefore, Dunn's in court identification was based upon observations some three years old, made without any intervening opportunity to refresh his recollection.

prior to his testimony, but he had needed them before that time (306). Dunn also indicated that he had written up a report on May 5, 1978, regarding the surveillance of the 4th and that this report and the surveillance photographs and negatives had been turned over to the Strike Force (311, 312-321).

Petito renewed his request[11] that these photographs, negatives, and reports be turned over to him for inspection (311-312). The government responded that: "Your Honor, it is not in my custody. I am having it looked for . . ." (311) and "they are not in our custody" (312). Needless to say, these items were never supplied to counsel.

After the conviction, Petito moved pursuant to Rule 33 F.R.Cr.P. to set aside the conviction. In this motion, Petito asserted as a ground the absence at trial of Dunn's reports and the photographs. In the alternative, Petito requested a hearing on the issue of where these items were and why they were not available. The Court denied this request.

This Court has held that even in the absence of a bad faith suppression, the government bears the burden of producing discoverable evidence (tapes) or explain why it could not do so. *United States v. Augenblich,* 393 U.S. 348 at 355-356 (1969). In *Augenblich,* the government could not produce tapes made of the interrogation of a government witness in a military court martial. In the absence of any showing of a bad faith suppression, or even negligence in the handling of the evidence, the Court held that there had been no violation of due process. *United States v. Bryant,* 439 F.2d 642 (D.C. Cir. 1971).

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11. Prior to Dunn's testifying, Petito requested that all 3500 material on Dunn be turned over to counsel (293). During cross-examination counsel stated with regard to the surveillance report "May I see a copy of it since I am entitled to it." (311) (24a-25a).

In this case, there is clear evidence of negligence. For Dunn's reports and photographs were turned over to the Strike Force which could only state that these items, though requested and discoverable, were not available. Originally, the government indicated that these materials might still be in the possession of Nassau County authorities. Evidently, a check with those authorities could not locate the evidence. However, Officer Dunn's testimony clearly indicated that all this evidence was turned over to the Strike Force at the Strike Force office.

Certainly, the government did not meet its burden[12] of explaining why it could not produce the evidence. *United States v. Augenblich, supra,* at 355-356. The only statements made by the government indicate that these evidentiary materials were negligently lost.

The Second Circuit, in its supervisory capacity,[13] has held that a negligent suppression of material evidence by the government entitles a defendant to a new trial. *United States v. Consolidated Foundries Corp.,* 291 F.2d 563, 570-571 (2d. Cir. 1961).

The issue then becomes whether the evidence negligently lost in this case was sufficiently material to require a new trial or even a dismissal of the charges.

The only proof of Petito's presence at 109th Street on May 4, 1978 was Dunn's testimony. This testimony was

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12. This burden of explanation has been described as a "heavy one" and one which requires the government to show that it made "earnest efforts" to preserve the crucial materials, and produce them when appropriately requested. "Earnest efforts" will itself be defined quite restrictively. *United States v. Bryant, supra,* at 651-652. In his Rule 33 motion, aside from requesting dismissal of the charges, Petito requested a hearing on the issue of the lost report and photographs.

13. The Court felt it unnecessary to determine if there had been a violation of due process 291 F.2d at 571.

far from conclusive. Dunn had never seen Petito before the observation; the observation was made at night from a distance of fifty yards by a person who admittedly was nearsighted; by the time of trial, some three years had elapsed between Dunn's having seen a photo of Petito and his next contact with the case. The potential for error is enormous. In this light, the failure to supply Dunn's report and the surveillance photographs[14] denied Petito access to material and important potential impeaching evidence as to the core issue of the case.

> No one can tell what might have happened had the Government's principal witness been confronted with them [the Owen documents] during cross-examination, or if certain of the documents had been available to refresh his recollection about facts which he did not remember and which if elicited, might have been helpful to the defendant. As stated in *Clancy v. United States,* 365 U.S. 312: "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively." *United States v. Consolidated Laundries Corp., supra,* at 570.

In conclusion, this Court should grant the writ to determine whether the loss of this evidence denied Petito due process of law and requires that he be granted a new trial.

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14. The importance of these photographs and negatives is not diminished by Dunn's belief, some three years after they were taken, that their quality was poor.

POINT IV

THIS COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE FAILURE OF THE TRIAL COURT TO GRANT PETITO'S REQUEST FOR DISCOVERY OF THE SUPPORTING PAPERS OF A WIRE TAP ORDER AND HIS REQUEST FOR A HEARING ON THE ISSUE DENIED HIM DUE PROCESS OF LAW, A FAIR TRIAL, AND EFFECTIVE ASSISTANCE OF COUNSEL.

The failure of the trial court to grant discovery and a hearing regarding the intercepted communications was error, for it permitted the Government to make use or derivative use of the fruits of the wiretap without affording Petito the opportunity to establish the illegality of the wiretaps.

In May and June 1978, the telephone of Louis Sanzo was tapped by Nassau County authorities. This tap was pursuant to a state warrant. During the period of the wiretap, Petito's conversations with Sanzo were intercepted. When Petito was called to the Grand Jury, he refused to testify on the grounds that the questions were formulated from illegally seized conversations. *Gelbard v. United States,* 408 U.S. 41 (1972). The Government brought the wiretap order and the supporting papers to Judge Bramwell, who found them to be facially sufficient.

After this finding, Petito was ordered to answer the questions asked of him before the Grand Jury.

After spending a month in prison, Petito testified before the Grand Jury. He was specifically asked about these intercepted communications, and all or almost all of the pertinent conversations were read into the record at the Grand Jury.

Prior to trial, Petito moved for discovery of the wiretap order, the supporting papers, and the logs of any intercepted communications (minutes of June 22, 1981, p.

3-4). Petito was informed by the Government that there was no need for motions, since the intercepted communications would not be offered at trial. It was further agreed that the Government and defense counsel would discuss the matter of the discovery of these papers and report back to the Court (minutes of June 22, 1981 p. 4-5).

No discovery of these papers was granted by the Government, except for the sealing orders. On June 29, 1981, counsel renewed his request to see these papers in order to determine if any motion lay regarding the use at trial of these wiretaps. Counsel indicated that the possible illegality of the wiretap could affect the manner in which the wiretaps could be used at trial. Counsel requested a hearing on the issue. The Court reserved decision (minutes of June 29, 1981, p. 9-12).

During the trial, when the Government attempted to read portions of the Grand Jury proceedings, which consisted of questions based directly upon the intercepted communications as well as direct quotes from those conversations, counsel objected and reminded the Court that he had raised pre-trial objections to the use of these wiretaps and that the Government was now using the wiretaps. Further, that this indirect use was a fruit of the interception and that the Court should not permit such a use (86-88). Part or all the supporting papers were then shown to the Court, counsel did not see them (88).

The Government then read a series of very damaging questions and answers from the minutes of the Grand Jury proceedings of August 16, 1979.[15] The questions are virtual quotes from the intercepted communications (88-92). Later in the trial, the Government placed into evidence, over objection, the entire Grand Jury proceedings of August 27, 1979 (154-158). The Government then read

15. None of these questions were the basis of the criminal contempt or perjury—rather, they were used to prove Petito's intent.

another series of questions and answers which directly related to these wiretaps (170-220). Again, many of these questions were direct quotes from the tapes and the trial jury was informed by this evidence that the tapes were played for Petito in the Grand Jury (174).

The use at trial of the fruits of the wiretap entitled Petito to a hearing on their legality. While the determination of facial validity by Judge Bramwell may have been sufficient to compel Petito to answer questions, *In re Persico,* 491 F. 2d 1156 (2d Cir.) *cert. den.,* 419 U.S. 924 (1974), but see *In re Lochiatto,* 497 F.2d 803 (1st Cir. 1974); *Melickian v. United States,* 547 F.2d 416, 420 (8th Cir. 1977); *In re Grand Jury Proceedings,* 613 F.2d 1171 (D.C. Cir. 1979); a finding of mere facial validity is not sufficient to permit the direct or indirect use of the wiretaps at trial. The reading at trial of the questions asked of Petito which were formulated directly from the wiretaps, was at the least, an indirect use of the wiretaps. Certainly, it was an exploitation of the interception and the use at trial was a fruit of the interception.

In *United States v. Morales,* 566 F.2d 402, (2d Cir. 1977), the Second Circuit holds that a criminal contempt trial is so intimately associated with the Grand Jury proceedings as to be part of that proceeding and therefore, once facially validity of a wiretap order is shown, an accused contemnor has no further right under 18 U.S.C. §2515 and 2518(10) to discover information or to attack the wiretap order.

The statutory interpretation of *Morales* is not merely strained but leads to preposterous results. This case presents a clear example of the lack of reason in the *Morales* opinion. Here, a trial held after indictment and almost two years after the Grand Jury appearance is considered to be the same proceeding as the Grand Jury appearance.

The Court in *Morales* found that it was the intent of Congress that the fruits of an illegal wiretap should be barred in only "another context". With this finding petitioner has no quarrel. However, the leap taken by the *Morales* Court from that finding is not well founded. There is nothing in the legislative history to show that Congress did not intend that a criminal trial held two years after a Grand Jury appearance be considered a different context. In fact, the only way that the *Morales* Court closes this gap is to abandon the traditional rule that civil and criminal contempts are distinct and separate. This is accomplished by creating a coercive effect of criminal contempt sanctions. *Id.* at p. 408. The difficulty with this position is underscored by the same Court when it holds, in the context of a double jeopardy argument, that "The civil and criminal sentences served distinct purposes, the one coercive, the other punitive and deterrent". *Id.* at 409.

Even if *Morales* is correct in its statutory interpretation, that interpretation is in conflict with the Fourth Amendment. Simply put, the Government made use of the fruits of a wiretap at a criminal trial without affording Petito the opportunity to contest the wiretap's legality. The Fourth Amendment does not permit such a use.[16]

The statutory scheme of Title III is subordinate to the mandates of the Fourth Amendment. See, *United States v. Tortorello,* 480 F.2d 764 (2d Cir. 1973); *United States v. Fino,* 478 F.2d 35 (2d Cir. 1973). *Gelbard v. United States,* 408 U.S. 41, 45 N.5 (1972) specifically left open the issue of the rights of a Grand Jury witness to rely on the Fourth Amendment. However, in *United States v. Calandra,* 414 U.S. 338 (1974), the Supreme Court holds that a witness could not invoke the Fourth Amendment as a basis for refusal to answer questions. This holding is based upon the nature of the exclusionary rule and the effect of a con-

16. The failure to provide discovery also denied Petito his Sixth Amendment right to effective assistance of counsel.

trary holding upon the functioning of the Grand Jury proceedings. See *United States v. Morales,* 566 F.2d 402, 407 N.7 (2d Cir. 1977).

So too, in *In re Persico,* 491 F.2d 1156 (2d Cir.) *cert. den.* 419 U.S. 914 (1974) the issue is a procedural one under the statutory scheme and deals only with harmonizing inconsistent policy considerations and statutory language. It does not deal with the issue of whether the Fourth Amendment permits the use at trial of illegally seized evidence, where there is a facially valid warrant.

In fact, the only authority other than *Morales* which directly considers this issue rejects *Morales* and permits a motion to suppress at trial under the circumstances of this case. *People v. McGrath,* 46 N.Y.2d 12, 23 N.4 (1978).

For these reasons, the Court should grant the petition in order to clarify and resolve the tension between *Morales* and the Fourth Amendment.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

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Appendix

APPENDIX A—OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

AMADIO PETITO,

Defendant.

CR-81-00150

MEMORANDUM OF DECISION AND ORDER

COSTANTINO, D.J.

The defendant, Amadio Petito, was charged in a two-count indictment with perjury, in violation of 18 U.S.C. §1623, and criminal contempt, in violation of 18 U.S.C. §401. He moved to dismiss the contempt charge prior to trial. The court denied the motion orally and now submits this memorandum fully setting forth its reasoning.

FACTS

In July, 1980, Petito was called to testify before a grand jury investigating possible racketeering and tax violations against officials of Local 29 of the Blasters, Drillrunners, and Miners Union.[1] Petito refused to answer certain questions posed by the Government by invoking his fifth amendment right against self-incrimination. After

being given immunity pursuant to 18 U.S.C. §§6002-3, he continued to refuse to answer these questions and was cited for contempt and incarcerated. After spending twenty days in jail, Petito agreed to testify before the grand jury. It was during this testimony that he allegedly committed perjury. He was subsequently indicted for perjury and criminal contempt.[2]

Petito moved prior to trial to dismiss the contempt charge on the ground that once a defendant has been cited for civil contempt, he subsequently cannot be indicted for criminal contempt unless he is warned at his civil contempt proceeding that he may also be prosecuted criminally. In the case at bar, it is undisputed that Petito was not advised of the possibility that he could be indicted for criminal contempt after being cited for civil contempt. Further, it is claimed that the defendant's eventual willingness to testify before the grand jury and the attempt to purge himself of civil contempt should be taken into account by this court in assessing the necessity of prior warning.

LAW

This issue seems to be one of first impression in the Second Circuit. Petito bases his claim on the Ninth Circuit's decision in *Yates v. United States,* 227 F.2d 848 (9th Cir. 1955) (*Yates I*). In *Yates I* the defendant in a Smith Act prosecution was held in civil contempt for refusal to answer four questions posed on June 26. On June 30, the defendant again refused to answer a series of questions, although she was directed to do so by the trial judge. Yates was then sentenced on four separate contempts. The Court of Appeals reversed these latter four sentences. *Yates v. United States,* 227 F.2d 848 (9th Cir. 1955).

The decision in *Yates I* was based on due process grounds. After examining the different purposes between

civil and criminal contempt, the Ninth Circuit went on to hold that "while coercion [a civil contempt sentence] is applied, the defendant in the criminal case is entitled to know he may yet be subjected to a definite penalty for contempt and that the coercive restraint is not intended to relieve him of the punishment for the criminal refusals which he has already uttered." *Yates v. United States,* 227 F.2d 848, 850-51. The court based this holding in part on the "notions inherent" in due process of law. *Yates I* at 851.

Three years later, the Ninth Circuit reaffirmed and expanded the *Yates I* holding in *Daschbach v. United States,* 254 F.2d 687 (9th Cir. 1958). As the court explained, "the circumstances present in that Yates case and in the instant case [*Daschbach*] are of such similarity that the due process consideration referred to in the Yates case is equally present here . . . the rationale of that opinion, however would apply equally to one who, like appellant Phillips, was a witness but not a defendant." *Daschbach* at 690. The court thus expanded the *Yates I* holding to witnesses who refused to testify. The court then concluded that in the absence of any notice that "the coercive restraint was not intended to relieve [appellants] of a possible penal sentence," the subsequent convictions and sentences for criminal contempt deprived appellants of due process of law. *Daschbach* at 692.

The rule established in *Yates I* and *Daschbach* remains the only precedent directly on point. While the issue of notice under *Yates I* and *Daschbach* has never been squarely faced by the Second Circuit, two cases provide the court with guidance in this matter. Both cases suggest a result different from that reached in *Yates I* and *Daschbach.*

In *United States v. Berardelli,* 565 F.2d 24 (2d Cir. 1977), the court upheld defendant's conviction for criminal contempt. On appeal, it was contended that the trial court's charge was erroneous insofar as it refused to

charge that " 'the jury in a criminal contempt case must find not only that the defendant intended to disobey the court's order but also that he had the specific intent to disobey *the law*' . . . (emphasis in original)." *United States v. Berardelli,* 565 F.2d at 30. The court summarized defendant's request as "a charge to the effect that ignorance of 'the law' would be a defense." *Berardelli* at 30. The Second Circuit upheld the trial court's refusal to charge the jury to this effect.

An additional Second Circuit case providing this court with guidance is *United States v. Morales,* 566 F.2d 402 (2d Cir. 1977). In *Morales,* the defendant refused to testify before a grand jury. He was cited for civil contempt and jailed. He was released soon thereafter but was indicted for and convicted of criminal contempt.

Morales appealed, questioning the power of the grand jury to indict him for criminal contempt insofar as a judge had not referred the alleged contempt to the grand jury. The Court of Appeals held that "[r]eversal would not . . . be warranted unless Morales could demonstrate that his indictment prejudiced him—for example, by failing to accord him the notice or other rights provided by Rule 42, F.R. Crim. P. . . ." *United States v. Morales,* 566 F.2d at 405 (footnote and citations omitted). Insofar as Morales did not claim that the indictment deprived him of notice or any other right provided by Fed. R. Crim. P. 42(b)[4], the court upheld the indictment. The court went on to hold that "Rule 42(b) does not purport to exclude the possibility of proceeding against contemnors by indictment." *Morales* at 405 n.2.

The question not reached in *Morales,* concerning the circumstances under which a defendant may be deprived of proper notice, is presented here for decision.

The defendant urges this court to apply the rule established in *Yates I* and *Daschbach.* The court refuses to do so. First, this court finds the *Yates I* and *Daschbach*

decisions unconvincing. These cases merely state a conclusion; in essence, these opinions are devoid of any reasoning other than the statement that the lack of notice deprives a contemnor of due process. *Yates I* at 851; *Daschbach* at 692.

This court, however, does not regard the issue of prior notice as "inherent in the notions of due process." Rather, the issue is whether notice was given in accordance with Fed. R. Crim. P. 42(b). We must answer this question in the affirmative for three reasons: (1) ignorance of the law is not a valid defense in this case; (2) even assuming that this defense is raised, Petito, having been represented by counsel during the grand jury proceedings, should have known that he could be indicted for criminal contempt[3]; (3) under the foregoing two conditions, the indictment must have given Petito adequate notice under Rule 42(b).

We begin our analysis by applying the Second Circuit's holding in *United States v. Berardelli,* 565 F.2d at 30. Petito would have this court find that ignorance of the law should excuse him. We reject this notion. The legal maxim that ignorance of the law excuses no man has long been a major premise of our criminal law. *United States v. International Minerals and Chemical Corp.,* 402 U.S. 558, 563 (1971); *Lambert v. California,* 355 U.S. 225 (1957); *Williams v. North Carolina,* 325 U.S. 226, 238 (1945); *Armour Packing co. v. United States,* 209 U.S. 56 (1908); *United States v. Gregg,* 612 F.2d 43, 51 (2d Cir. 1979); *United States v. Squires,* 440 F.2d 859, 863-4 (2d Cir. 1971); *United States v. Inciso,* 292 F.2d 374, 380 (7th Cir. 1961), *cert. denied,* 368 U.S. 920 (1961); cf. *Uttermehle v. Norment,* 197 U.S. 40 (1905); cf. *Hunt v. Ronsmaniere's Adm.,* 26 U.S. (1 Pet.) 1 (1828); cf. New York Penal Law §15.20(2) (McKinney's 1971); cf. Oliver Wendell Holmes, *The Common Law,* ed. M. DeW. Howe, 41 (1963); cf. La Fave and Scott, *Criminal Law* §47 (1972); cf. E.C. Torcia

Wharton's Criminal Law §77 (14th ed. 1978). *See also United States v. Berardelli,* 565 F.2d at 30.

This maxim, however, is not an absolute rule. Ignorance of the law does constitute a defense "when it negatives the existence of a mental state essential to the crime charged." La Fave and Scott, *Criminal Law* §47 (1972). Cf. *United States v. Squires,* 440 F.2d at 863-4. Given the nature of the criminal contempt, Petito's claimed ignorance of the law did not "negative" the existence of the mental state required for his willful refusal to answer questions. Petito willfully refused to answer questions and he continued to do so even when committed to prison for civil contempt. Indeed, 18 U.S.C. §401[4] does not provide that a mental state is required for acts of criminal contempt.

Secondly, assuming *arguendo* that ignorance of the law in this case would suffice as a defense, the court does not believe that Petito was ignorant of the law. This court is cognizant of the fact that the defendant was represented by an attorney at all times during the grand jury proceedings. The attorney should have known of the possibility of criminal contempt proceedings being brought against Petito.

In addition to the foregoing considerations, the court finds that the indictment provided sufficient notice to Petito to satisfy the requirements of Fed. R. Crim. P. 42(b). Rule 42(b) requires that criminal contempt be "prosecuted on notice. . . . The notice shall be given orally by the judge in open court in the presence of the defendant *or, on application of the United States attorney* or of an attorney appointed by the court for that purpose, *by an order of arrest.*" (emphasis added) The court holds that an indictment sought by the United States attorney is the equivalent of "an order of arrest" for the purposes of Rule 42(b). Thus, the indictment provides adequate notice

to the defendant. To hold otherwise would seem to overrule the decision in *United States v. Morales,* 566 F.2d at 405 n.2, which held that an indictment is a valid method of instituting contempt proceedings.

Yet, the defendant claims that his eventual willingness to testify before the grand jury should be taken into account by this court in assessing the ncessity of prior warning. Petito's claim must be examined in light of the goals served by criminal and civil contempt punishments.

It has long been recognized that civil and criminal contempt serve different purposes. *Yates v. United States,* 355 U.S. 66, 74-75 (1957). Civil contempt is a coercive measure used to force individuals to comply with a court's order. Because of its coercive nature, a civil contempt penalty for refusal to testify before a grand jury cannot extend beyond the term of that grand jury.

Criminal contempt is a punitive measure. It is punishable in a separate proceeding. *Yates v. United States,* 227 F.2d 848, 850 (9th Cir. 1955). A sentence imposed upon conviction on criminal contempt is designed to punish the contemnor, not to coerce him. The decision to seek criminal contempt charges is wholly within the discretion of the prosecutor. Since Petito received notice and claims no other deprivation of rights, the court upholds the government's right to institute criminal contempt proceedings against the defendant.

For the foregoing reasons, the court finds that it cannot agree with the reasoning and findings set forth in *Yates I* and *Daschbach.* Accordingly, the defendant's motion to dismiss the contempt charge of the indictment is denied.

So Ordered.

s/ Mark A. Costantino
United States District Judge
August 7, 1981

FOOTNOTES

1. The grand jury investigation resulted in several indictments for RICO, conspiracy, and tax violations.

2. Between the oral decision on this motion and the filing of this opinion, Petito was tried and convicted by a jury on both counts of the indictment.

3. The eleven convictions for criminal contempt were affirmed by the Ninth Circuit *Yates v. United States,* 227 F.2d 844 (9th Cir. 1955), *reversed in part, Yates v. United States,* 355 U.S. 66 (1957). The Smith Act conviction was reversed by the Supreme Court. *Yates v. United States,* 354 U.S. 298 (1957).

4. Fed. R. Crim. P. 42(b) provides in pertinent part:

> (b) Disposition upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. . . ."

5. No claim of ineffective assistance of counsel is raised.

6. 18 U.S.C. §401 provides:

> Power of court
>
> A court of the United States shall have power to punish by fine or imprisonment, at its discretion such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

APPENDIX B—OPINION OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 506—August Term, 1981
(Argued: December 15, 1981 Decided: January 26, 1982)
Docket No. 81-1333

UNITED STATES OF AMERICA,

Appellee,

-against-

AMADIO PETITO,

Appellant.

Before:
Timbers, Kearse, and Cardamone, *Circuit Judges.*

Appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York, Constantino, J., following a jury trial, for contempt in violation of 18 U.S.C. §401 and perjury in violation of 18 U.S.C. §1623.

Affirmed.

LAURA A. BREVETTI, United States Attorney, Organized Crime Strike Force, Eastern District of New York (Edward R. Korman, United States Attorney, Eastern District of New York and Thomas P. Puccio, United States Department of Justice, Organized Crime Strike Force, Eastern District of New York, on the brief), *for Appellee.*

J. JEFFREY WEISENFELD, New York, New York *for Appellant.*

CARDAMONE, *Circuit Judge:*

During a grand jury investigation in the Eastern District of New York into illegal payoffs to union leaders of Local 29 of the Blasters, Drillrunners and Miners Union, appellant, Amadio Petito, an officer of that union, was called as a witness and refused to testify. The district court thereupon granted him immunity.[1] When appellant still refused to testify after the grant of immunity, the district court advised him that he would "be held in custody for the life of the Grand Jury, or prior to that at such time as [he] may purge [him]self of contempt by testifying before the Grand Jury."

Subsequently convicted for criminal contempt and perjury, appellant has raised several issues for our consideration on this appeal. Principal among them is his assertion that the statement made to him by the district court led him to believe that the only result of his refusal to testify would be his liability for civil contempt, and that, upon appearing and testifying, no further consequences would be visited upon him. He claims that when held for civil contempt he was entitled—under notions of due process—to notice of the possibility that a chage could be laid against him for criminal contempt. Because we find this contention unpersuasive and the other issues raised without merit, we affirm the judgment of conviction.

FACTS

In 1979 a Special Grand Jury in the United States District Court for the Eastern District of New York began an investigation to determine whether Louis Sanzo, president of Local 29 of the Blasters, Drillrunners and Miners Union, had received illegal payoffs during the years 1974 through 1979, and whether Samuel Cavalieri, who was not a union member, actually controlled Local 29 and shared

in the payoffs to Sanzo. Appellant Petito, who was secretary-treasurer of Local 29 during part of this time, was called to testify before the grand jury on July 20, 1979. When asked questions concerning Samuel Cavalieri and Local 29, Petito refused to answer, invoked his Fifth Amendment privilege and requested immunity from prosecution based on his testimony. He also refused to testify without a court ruling on whether certain questions proposed to him were based on information obtained from illegal electronic surveillance.

Petito appeared with counsel before Judge Henry Bramwell on July 20th. At that time the prosecuting attorney submitted an order signed by a New York State Supreme Court Justice authorizing surveillance of Sanzo's telephone. The prosecutor acknowledged that Petito would be interrogated before the grand jury on matters derived from this wiretap. Ruling that the wiretap order was facially valid, Judge Bramwell granted Petito immunity and directed him to testify. The court also warned Petito that failure to testify truthfully might result in his prosecution for perjury.

Appellant reappeared before the grand jury on the same day. For the second time he refused to testify concerning Cavalieri and the union, asserted his Fifth Amendment privilege, and declined to answer questions based on the allegedly illegal interceptions of his telephone conversations with Sanzo. The prosecutor then advised Petito that he could no longer withhold his testimony on these grounds and that his further refusal to obey the court's order could result in his being held in contempt and incarcerated until he agreed to answer questions. The parties returned to Judge Bramwell who once again ordered Petito to testify. After conferring with his attorney, he responded that he would not. Judge Bramwell found Petito in contempt of court and made the statement previously quoted.

Appellant was held in custody for twenty-seven days. He next appeared before the grand jury on August 16, 1979, at which time he made a statement that he still objected to answering questions but would do so because a judge had ordered him to. He proceeded to respond to a number of inquiries about himself, Cavalieri, Sanzo and the union.

The grand jury interrogated him with respect to his whereabouts and activities following a union nomination meeting held on May 4, 1978. At first he stated that he could not presently recall exactly the events of one specific night some fifteen or sixteen months in the past. The inquiry focused on whether Petito had visited a social club on Second Avenue between 109th and 110th Streets run by Samuel Cavalieri. Petito stated that at that time his father lived in the vicinity of Cavalieri's social club and that he might have gone to visit his father after the meeting, but that he could not remember whether he did or not. He concluded with "I am telling you that I possibly, yes, I might have seen [Cavalieri], I might have been with my father, I don't know."

The following day, Petito stated that he wanted to change part of his previous testimony which he believed was incorrect. He then said

> I thought about it and I remember that I did not go [to Cavalieri's social club] . . . I mentioned to you that it was a possibility that if I did go to 109th Street it was a question of seeing my father who was alive at the time. But remembering after I left here, I had met my father outside of where we had this election . . . I remember meeting him and after the meeting and that's why I am saying now that I never went to 109th Street. Before I answered there was a possibility that I did or didn't. More or less the reason was to see my father, but I remember seeing my father outside of the election hall.

Petito later repeated that he did not go to Cavalieri's social club on May 4, 1978.

The grand jury filed an indictment on March 17, 1981 which charged Petito with criminal contempt[2] for wilfully disobeying Judge Bramwell's order to testify after receiving a grant of immunity, and with perjury[3] for his August 17, 1979 testimony that he did not go to Cavalieri's social club.

To prove criminal contempt the government offered the court orders and grand jury transcripts detailing the above-described events of July 20, 1979. To support the perjury count the minutes of Petito's entire testimony before the grand jury on August 16 and 17, 1979 were admitted into evidence and portions were read to the trial jury. Additionally, William Dunn, a Special Investigator for the Nassau County District Attorney's Office, testified that on May 4, 1978 between 7:30 and 9:00 p.m. he conducted a surveillance outside of Cavalieri's social club in order to determine whether Petito, Sanzo and Cavalieri would attend a meeting there. Dunn had been provided with a description of Petito as being a person 5'7" tall, weighing 175 pounds, stocky, bald and clad in work clothes. Dunn testified that, using binoculars and standing about fifty yards away, he observed a man whom he identified in court as Petito cross the street and enter the social club at about 8:00 p.m. He also observed Sanzo and Cavalieri enter the club at approximately the same time. About forty minutes later he saw all three men exit the club and walk away together. Dunn instructed a photographer who accompanied him to take pictures of these individuals. He further testified that he saw and recognized Petito again in Sanzo's company two months later on July 6, 1978, at which time photographs were also taken. When later viewging these July 6th photos, Dunn confirmed his identification of Petito as the man he had seen on May 4, 1978 at Cavalieri's social club.

Appellant presented four witnesses. One testified that Petito arrived at his home in Port Washington, New York at 8:45 p.m. on May 4, 1978. Another said that he "hung around" the social club regularly, but did not see Petito there on May 4, 1978. A third stated that he owned a bakery adjacent to the club and did not see Petito on Second Avenue that evening. The last witness claimed that he saw Petito leave the union meeting hall at 8:00 p.m. in a car with Louis Sanzo and others.

Both before and during trial appellant requested discovery of the wiretap supporting papers of his telephone conversation with Sanzo or a hearing on the propriety of issuing the wiretap order. His requests were denied.

DISCUSSION

I

Preindictment Notice of Possible Criminal Contempt Charge Is Not Required

Appellant has raised what appears to be an issue of first impression in this circuit. He contends that the statement the district court made to him after he had been granted immunity and still refused to testify, was in some way misleading. He claims the statement led him to believe that the only consequence of his conduct was civil contempt, and that there would be no further sanction if he testified.

This view of the law misreads the function of civil and criminal contempt. The one is coercive, to compel obedience to a lawful court order; the other is retributive, to punish for an offense against the public and to vindicate the power of the court. An individual who refuses obedience to a valid order is subject to both civil and criminal contempt for the same acts. *Yates v. United States,* 355 U.S. 66, 74, 78 S.Ct. 128, 133, 2 L.Ed.2d 95, 102, (1957).

The power to impose coercive imprisonment in a civil contempt proceeding is limited by the individual's ability to comply with the court's order. When the grand jury is discharged, confinement for civil contempt must terminate because the possibility of compliance has ended. *Shillitani v. United States,* 384 U.S. 364, 371, 86 S.Ct. 1531, 1536, 16 L.Ed.2d 622, 627-28 (1966).

Prosecution for criminal contempt rests on a different footing. The public interest in orderly government demands respect for compliance with court mandates. Thus, to disregard a court order may at the same time subject an individual civil contemnor to criminal contempt proceedings for his violation of the law. A trial court ordinarily first applies the coercive remedy of civil contempt and only makes use of the criminal sanction when the disobedience continues. But there is no requirement that a defendant be warned specifically or have notice that his conduct could be visited with a criminal as opposed to a civil sanction. *United States v. Joyce,* 498 F.2d 592, 595 (7th Cir. 1974). "One who defies the public authority and willfully refuses his obedience, does so at his peril." *United States v. United Mine Workers of America,* 330 U.S. 258, 303, 67 S.Ct. 677, 701, 91 L.Ed. 884, 918 (1947).

Other circuts have reached varying conclusions in analogous circumstances. The Ninth Circut has held that notions inherent in due process require positive notification of a possible criminal contempt at the time civil contempt sanctions are imposed. *Yates v. United States,* 227 F.2d 848 (9th Cir. 1955), *aff'd* in part, *rev'd* in part, 355 U.S. 66 (1957)'; *Daschbach v. United States,* 254 F. 2d 687 (9th Cir. 1958). No authority is cited as the basis for that circuit's conclusion. In contrast, the Seventh Circuit has held that a contemptuous defendant need not be warned, nor even be aware, that his conduct could be visited with a criminal sanction. In *United States v. Seale,* 461

F.2d 345 (7th Cir. 1972), the court rejected a defendant's contention that having been bound and gagged during trial could have relieved him of the reasonable expectation of a criminal contempt penalty for his conduct. Moreover, the Eighth Circuit has noted that there are many instances when individual action may subject an actor to both criminal and civil sanctions. It is not necessary that the actor, at the time he contemplates his act, be certain as to which of the appropriate sanctions will be invoked. *United States ex rel. Shell Oil Co. v. Barco Corp.*, 430 f.2d 998, 1001 (8th Cir. 1970).[5]

In our view there is no requirement that preindictment notice need be given an individual, held in civil contempt for his refusal to testify following a grant of immunity, that he could also be subject to a charge for criminal contempt. Appellant had committed the act subjecting him to criminal contempt at the moment he refused to answer questions after being granted immunity. Any remarks later made by Judge Bramwell, when Petito appeared before him for the second time, were after the fact of the contemptuous act. Appellant had already chosen to disregard the law and risk the consequences. To suggest that he is entitled to notice of those consequences or of the crime he had already committed as a prerequisite to being prosecuted is tantamount to adopting the doctrine—which we recently rejected as unsound[6]—that ignorance of the law is an excuse. We have not been convinced that we should adopt a wholly new procedural right of notice in criminal contempt proceedings.[7]

II

Other Issues

We turn finally to the several other issues raised. Appellant argues that he was denied a fair trial because the

May 4,1978 photographs and surveillance report made by Dunn and his associate were unavailable. Since Dunn's testimony constituted the principal proof of perjury, appellant sought these items in order to attack Dunn's credibility.

Under the Jencks Act appellant was entitled to production of the surveillance report because it constituted the "statement" of a government witness, Dunn, relating to the subject matter about which the witness had testified, his observation of Petito. 18 U.S.C. § 3500 (b) and (e). Appellant did not, however, make a motion for production of the report until after trial and has therefore waived any right to relief based on his failure to receive the document at trial. *United States v. Braunig,* 553 F.2d 777, 780 (2d Cir.), *cert. denied,* 431 U.S. 959 (1977).

Petito would be entitled to production of the May 4th photographs and negatives if they were "material to the preparation of his defense," Fed. R. Crim. P. Rule 16(a)(1)(C), or created a reasonable doubt about his guilt "that did not otherwise exist," *United States v. Agurs,* 427 U.S. 97, 109-10, 112, 96 S.Ct. 2392, 2400-02, 47 L.Ed.2d 342, 353, 358 (1976). Whether sanctions for nondisclosure of material evidence should be imposed involves a case-by-case assessment of the nature of the evidence sought, its bearing upon critical issues in the case, the reason for its nonproduction and the strength of the government's untainted proof. *United States v. Grammatikos,* 633 F.2d 1013, 1019 (2d Cir. 1980). Where the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if "there is a 'significant chance that [the] added item...could have induced a reasonable doubt in the minds of enough jurors to avoid conviction.' " *United States v. Miranda,* 526 F.2d 1319,1325 (2d Cir. 1975), *cert. denied,* 429 U.S. 821

(1976), quoting *United States v. Morell*, 524 F.2d 550, 553 (2d. Cir. 1975).

Dunn's eyewitness identification of Petito on the night of May 4, 1978 outside of Cavalieri's social club was the proof the government relied on to establish his presence there. This identification was not based on his viewing of the photographs in question. His testimony, apparently believed by the jury, amply supported the conviction. Hence, the photographs were not material to the defense and the failure to produce them does not constitute grounds for a new trial.

Appellant's request for discovery of the wiretap order and its supporting papers and for a hearing on the legality of the order is readily disposed of by *United States v. Morales*, 566 F.2d 402 (2d Cir. 1977), which, on strikingly similar facts, is controlling. In *Morales* appellant was called to testify before a grand jury and refused. He was then granted immunity but again refused to testify on the ground that the questioning was based on evidence seized by illegal electronic surveillance. After an *in camera* examination of the papers the order was found facially valid. Upon his continued refusal to testify, Morales was prosecuted and convicted of criminal contempt.

On appeal we noted that the determination of facial validity at an *in camera* examination was sufficient to require an individual to answer grand jury questions. *Morales*, 566 F.2d at 406; *In re Millow*, 529 F.2d 770, 773 (2d Cir. 1976); *In re Persico*, 491 F.2d 1156 (2d Cir.), *cert. denied*, 419 U.S. 924 (1974). We held that there was no right to a suppression hearing since the criminal contempt proceeding, although occurring after the grand jury had disbanded, was so intimately connected with that grand jury as to be a "part of those proceedings." *Morales*, 566 F.2d at 408. Thus, in the instant case appellant did not have the right to discovery of the wiretap order and its

supporting papers, or to a suppression hearing on the propriety of its issuance.

Finally, appellant claims admission of the entire grand jury transcript into evidence was error because it was repetitive, cumulative and confusing. He also asserts that the reading of certain selected excerpts to the jury created an impression of greater reluctance to testify on his part than was actually the case. The grand jury minutes were offered to prove Petito's willfulness and state of mind in committing perjury. They bear, as well, on his credibility. As such they were relevant and admissible. Appellant claims not that this evidence was prejudicial or inflammatory, rather, that it was repetitive. Even if admission of repetitive evidence amounted to error, which it did not, this claim would not warrant reversal under the harmless error standard. As for Petito's assertion that the government's selection of excerpts was misleading, he was free to read whatever additional portions he desired to counter any false impressions he thought were left by the government's choices.

The mandate of the court should issue forthwith.

The judgment of conviction is affirmed.

FOOTNOTES

1. 18 U.S.C. §6002 provides:

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify . . . in a proceeding before . . .

(1) a court or grand jury of the United States,

. . .

and the person presiding . . . communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order . . . may be used against the witness in any

criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

2. 18 U.S.C. §401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as

. . .

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

3. 18 U.S.C. §1623(a) provides:

Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.

4. The *Daschsbach* case, 254 F.2d 687 (9th Cir. 1958), which followed *Yates,* sheds light on the *Yates* rationale. That court was particularly concerned with the fact that Daschbach, like Yates, had not been notified that his restraint for refusing to answer questions at trial could last only until the end of the trial. The circuit court reasoned that the district court had created a false impression of indefinite confinement for contempt which would terminate only when the defendant chose to cooperate by testifying. The court apparently believed that the wrongful impression of indefinite incarceration violated notions inherent in due process. This concern led the panel to require notification of a possible definite penalty for criminal contempt at or about the time coercive restraint is applied.

5. These remarks were made in the context of upholding a criminal contempt conviction against a claim that the controlling statute was unconstitutionally vague.

6. See *United States v. Berardelli,* 565 F.2d 24, 30 (2d Cir. 1977).

7. Before leaving this issue, we comment briefly on arguments made in the lower court and in appellant's brief. Language cited by appellant from *In re Irving,* 600 F.2d 1027

(2d Cir.), *cert. denied,* 444 U.S. 866 (1979), admonishing restraint in the imposition of criminal contempt penalties, as well as similar and even stronger phraseology in dicta in *Shillitani,* 384 U.S. at 371, 86 S.Ct. at 1536, 16 L.Ed.2d at 628 n.9, does not really bear upon the claim involved in this case. Those remarks refer to the substantive issue of the propriety of imposing criminal contempt penalties in particular situations. Petito is not questioning the legality of the criminal contempt sanction *per se;* rather, he is making a procedural objection to his supposed lack of notice of that sanction.

References in the briefs and the lower court's opinion to *United States v. Morales,* 566 F.2d 402 (2d Cir. 1977), and Rule 42(b) of the Federal Rules of Criminal Procedure are, likewise, unilluminating. Rule 42(b) and its treatment in *Morales* deal with the notice necessary to apprise an individual that he is at that moment being prosecuted for criminal contempt. The lack of notice Petito complains of involves notice that he might at some future time be prosecuted for criminal contempt. Petito received adequate Rule 42(b) notice in his indictment; his appeal stems from lack of preindictment notice to which he is not entitled.

APPENDIX C—ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, the City of New York, on the tenth day of March, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AMADIO PETITO,
Defendant-Appellant.

No. 81-1333

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Amadio Petito,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel

that heard the appeal and that no such judge has requested that a vote be taken thereon.

s/ A. Daniel Fusaro
A. Daniel Fusaro
Clerk

by s/ Francis X. Gindhart
Chief Deputy Clerk.

APPENDIX D—EXTRACT OF PROCEEDINGS AT TRIAL

Dunn-cross

Q. Or if it was Daylight Savings Time that was in effect, it would be Daylight Savings Time.

Are you aware that on May 4, 1978 sunset occurred at 7:55?

A. Yes.

Q. So it wasn't dark when Mr. Petito showed up at 8:00?

A. No, it wasn't dark when I saw him.

Q. Are you aware that the street lights go on at 8:05 or 8:10 by sensors, ten or fifteen minutes after it gets dark?

A. I wasn't aware of that.

Q. What kind of weather was it? Was it warm, hot, cold? What kind of day was May 4th?

A. Well, as I remember, most of the individuals wore either heavy suit jackets, sport jackets, or light zipper jackets.

Q. What was the weather like? You don't remember what the weather was like? You are assuming what the weather was like from what people wore, is that correct?

A. Well, I am telling you what I remember. I said it was raining at the time. When I first saw Mr. Petito, it was very clear and it was dry and—

MR. WEISENFELD: I apologize, your Honor. I have a document that I was searching for.

Q. But you are telling us when you first saw Mr. Petito at 8:00 o'clock—

A. Yes.

Q. —it was clear and dry at that time?

A. As far as I remember, yes.

MR. WEISENFELD: Your Honor, I apologize for this delay, but I have to find something.

With the Court's indulgence, may I have one minute?

Q. By the way, did you take any notes or mark log entries of anything in a memo book at the time that you made these surveillances?

A. I wrote up a report the following day.

Q. Where is that report?

A. I turned it over to the Strike Force.

MR. WEISENFELD: May I see a copy of it since I am entitled to it?

MS. BREVETTI: Your Honor, it is not in my custody. I am having it looked for—

Q. Did you ever see the negative of this surveillance photograph that is now offered in evidence?

A. I am sorry?

Q. Did you ever see a negative of any of the surveillance photographs?

A. I saw several negatives.

Q. Did you ever see a negative—

Are you squinting again?

A. No. Maybe I am, I don't know.

Q. Do you know where the negatives are of any of these photographs?

A. No.

Q. Did you turn them over to the Strike Force?

A. Yes.

MR. WEISENFELD: Can I see those?

MS. BREVETTI: They are not in our custody.

Q. When you say the Strike Force, do you mean the Eastern District Strike Force?

A. Exactly.

Q. That is in Ms. Brevetti's office?

A. Right.

Q. Now, in fact the surveillance photograph just shows one man, his back and not his face?

MS. BREVETTI: Your Honor, I object. I never showed him that—

Q. There was a photographer there and he took pictures and the pictures didn't come out, is that right?

APPENDIX E—TEXT OF CONSTITUTIONAL PROVISIONS AND STATUTES.

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

§3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such

withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

§2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§2518. Procedure for interception of wire or oral communications

(1) Each application for an order authorizing or approving the interception of a wire or oral communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication under this chapter shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication under this chapter shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the appellant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as possible, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of

the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception.

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter

shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the juge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and

such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral com-

munication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

Opposition

FILED

No. 81-2051

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMADIO PETITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conviction for criminal contempt should be reversed because, at the time he was held in civil contempt for refusing to testify before a grand jury, the district court failed to warn him that he could also suffer criminal sanctions for the same refusal.

2. Whether petitioner can be indicted by a grand jury for criminal contempt in violation of 18 U.S.C. 401 after he has purged his contempt by testifying.

3. Whether petitioner was denied a fair trial because the government failed to preserve evidence.

4. Whether the district judge erred in failing to require disclosure of a wiretap order and application.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2051

AMADIO PETITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 9a-21a) is reported at 671 F. 2d 68. The opinion of the district court denying petitioner's motion to dismiss the charge of criminal contempt (Pet. App. 1a-8a) is reported at 519 F. Supp. 838.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1982. A petition for rehearing was denied on March 10, 1982. The petition for a writ of certiorari was filed on May 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of criminal contempt in violation of 18 U.S.C. 401

(Count 1), and of making false declarations before a grand jury in violation of 18 U.S.C. 1623 (Count 2). He was sentenced to concurrent terms of four years' imprisonment, and a fine of $5,000 on Count 2.[1] The court of appeals affirmed (Pet. App. 9a-21a).

The evidence at trial established that in 1979 petitioner was subpoenaed to testify before a grand jury in the Eastern District of New York that was investigating an allegation that the president of Local 29 of the Blasters, Drillrunners and Miners Union had received illegal payments from Samuel Cavalieri. On July 20, 1979, petitioner, the secretary-treasurer of Local 29, appeared before the grand jury, invoked his Fifth Amendment privilege, requested immunity, and refused to answer any questions based on information received through illegal electronic surveillance (Pet. App. 10a-11a). Represented by counsel, petitioner then appeared before the district court. The government submitted to the court an order signed by a state judge authorizing wiretaps, about the results of which it planned to question petitioner, and the application for the order. After an in camera review, the court ruled that the wiretaps had been lawfully authorized. It granted petitioner immunity and directed him to testify. The court further warned petitioner to testify truthfully or suffer a possible perjury prosecution. Petitioner reappeared before the grand jury that day and again refused to answer questions (Tr. 58-60). Petitioner then reappeared before the district court and, after conferring with his attorney, told the court he would continue to refuse to testify (Tr. 62-66). The court found petitioner in contempt and ordered him imprisoned until he agreed to testify (Pet. App. 11a).

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[1]The court ordered that petitioner be credited with time served for a previous imprisonment for civil contempt arising out of the same acts as led to his conviction here.

Petitioner was held in custody for 27 days, after which he agreed to testify. Petitioner then reappeared before the grand jury and falsely testified that he did not go to Samuel Cavalieri's social club on the evening of May 4, 1978, following a union meeting (Pet. App. 12a). Petitioner was subsequently indicted by the grand jury, and convicted of criminal contempt for his violation of the court's order to testify and of perjury for his false testimony before the grand jury.

ARGUMENT

1. Petitioner contends (Pet. 8-13) that he was denied due process because the district court, when it cited him for civil contempt, failed to warn him that he could later be prosecuted for criminal contempt. Petitioner asserts that the court of appeals' decision rejecting this argument conflicts with the Ninth Circuit's decisions in *Yates* v. *United States*, 227 F. 2d 848 (9th Cir.1955), and *Daschbach* v. *United States*, 254 F. 2d 687 (9th Cir. 1958). This Court has recently declined to review an identical claim arising from this same grand jury proceeding. *Cavalieri* v. *United States*, cert. denied, No. 81-1498 (May 17, 1982). For the reasons stated in the government's brief in opposition in *Cavalieri*[2] further review of the issue in the present case is also unwarranted.

2. Petitioner also claims (Pet. 13-14) that his conviction for criminal contempt after his contempt had been purged is contrary to this Court's decision in *Shillitani* v. *United States*, 384 U.S. 364 (1966). This claim may have been suggested in a footnote in petitioner's brief in the court of appeals (see Appellant's Br. 26, n.*). The court of appeals did not think that the question had been presented, and

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[2]A copy of the government's brief in *Cavalieri* has been furnished to counsel for petitioner.

consequently did not rule on it (Pet. App. 20a-21a n.7). See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977). In any event the claim is without merit.

Nothing in *Shillitani* precludes a grand jury from indicting an individual for criminal contempt after he has purged his contempt by testifying. Shillitani was sentenced in a proceeding under Fed. R. Crim. P. 42(b) to a two-year conditional term of imprisonment. The judge made it clear that he could be released earlier if he testified. In these circumstances, the Court ruled that the sentence imposed was civil, not criminal. Moreover that interpretation, the Court stated (364 U.S. at 371), "accords with the doctrine that a court must exercise '[t]he least possible power adequate to the end proposed.' * * * *In re Michael*, 326 U.S. 224, 227 (1945)." In *In re Michael* the Court had elaborated on the reasons for that doctrine: "The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights, since contempts are summary in their nature, and leave determination of guilt to a judge rather than a jury." 326 U.S. at 227. In contrast to Shillitani, petitioner was indicted by a grand jury, and tried and convicted by a jury under 18 U.S.C. 401. Nothing in *Shillitani* precludes both civil and criminal contempt sanctions for the same conduct; indeed, this Court has elsewhere recognized that both may be appropriate. *United States* v. *United Mine Workers*, 330 U.S. 258, 298-300 (1947).[3]

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[3]Petitioner's claim that he was unfairly indicted for criminal contempt after he had "purged" his contempt by testifying (Pet. 13) is particularly unconvincing on the facts of this case. In the grand jury testimony which petitioner eventually gave, he perjured himself regarding his whereabouts following the union meeting of May 4, 1978.

3. Petitioner also claims (Pet. 14-18) that he was deprived of due process because the government lost important evidence. A state investigator testified at petitioner's trial that he had been surveilling Cavalieri's social club on the evening of May 4, 1978, and had seen petitioner enter the club at 8:00 p.m. and leave 40 minutes later with Cavalieri and the union president. A photographer, acting on the investigator's instructions, took a photograph of petitioner entering the club. The investigator later turned over a negative of this photograph and a surveillance report to federal authorities, who misplaced them (June 29 Tr. 3-8; Tr. 294-303, 311-312).[4]

Petitioner was entitled to the investigator's surveillance report under the Jencks Act, 18 U.S.C. 3500(b). However, he failed to move for its production until after trial (see Pet. 17a), and thus has waived any right to relief. See *United States* v. *Vila*, 599 F. 2d 21, 23 (2d Cir.), cert. denied, 444 U.S. 837 (1979). Furthermore where, as here, the government's failure to preserve evidence was unintentional a defendant is not entitled to relief unless he can show substantial prejudice. See *United States* v. *Miranda*, 526 F. 2d 1319, 1327 (2d Cir. 1975), cert. denied, 429 U.S. 821 (1976), and cases cited. Petitioner asserts that the photograph and the report might have impeached the investigator's testimony. However, both petitioner and his counsel saw the photograph prior to trial (June 29 Tr. 3-6). If the contents of the photograph had contradicted the investigator's testimony, counsel could have cross-examined him in that regard. He did not. The investigator did not rely on the photograph in identifying petitioner as one of the men whom he observed entering the club on May 4. Instead, he relied upon his direct observations of petitioner on May 4

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[4] "June 29 Tr." refers to the transcript of the pre-trial hearing of June 29, 1981.

and subsequently, and on photographs taken of petitioner on another occasion (Tr. 294-305). The court of appeals correctly held that the photographs and the report were not material to petitioner's defense and that the government's failure to produce them did not justify a new trial. See *United States* v. *Augenblick*, 393 U.S. 348, 355-356 (1969); *Killian* v. *United States*, 368 U.S. 231, 243-244 (1961).

4. Finally, petitioner claims (Pet. 19-23) that the district judge erred in refusing to require disclosure of the wiretap application, supporting affidavit, and the state court order. The court of appeals correctly rejected petitioner's claim.

In *Gelbard* v. *United States*, 408 U.S. 41 (1972), this Court left undecided the question whether a grand jury witness may refuse to answer a question based on information derived from a wiretap, if the conversations had been intercepted pursuant to a court order. 408 U.S. at 61 n.22; *id.* at 70-71 (White, J., concurring). The Second Circuit has since held that a grand jury witness held in civil contempt for his refusal to answer a question based on a wiretap is not entitled to a plenary suppression hearing to test the legality of that surveillance under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* *In re Persico*, 491 F. 2d 1156, cert. denied, 419 U.S. 924 (1974). It found that the procedure employed by the district court here—an in camera inspection of the wiretap papers and a determination that they were facially valid—adequately protects the witness while preventing recalcitrant witnesses from impeding the functioning of the grand jury through unfounded challenges. 491 F. 2d at 1161. The Fifth Circuit has concurred in the Second Circuit's approach. *In re Grand Jury Proceedings (Worobyzt)*, 522 F. 2d 196 (1975), cert. denied, 425 U.S. 911 (1976). Other circuits, however, have permited a grand jury witness faced with civil contempt proceedings limited access to a wiretap order and its supporting documents where the government has not

interposed a claim that disclosure will expose sensitive materials, jeopardize witnesses or informants, or pose a danger of educating grand jury witnesses. See *In re Grand Jury Proceedings (McElhinney)*, No. 82-5309 (9th Cir. May 17, 1982); *In re DeMonte*, 667 F. 2d 590 (7th Cir. 1981); *In re Harkins*, 624 F. 2d 1160, 1167 (3d Cir. 1980); *In re Grand Jury Proceedings (Katsouros)*, 613 F. 2d 1171, 1175 (D.C. Cir. 1979); *Melickian* v. *United States*, 547 F. 2d 416, 420 (8th Cir. 1977), cert. denied, 430 U.S. 986 (1977); *In re Lochiatto*, 497 F. 2d 803, 808 (1st Cir. 1974).

As the Fifth Circuit has noted, "the only point of disagreement in any authority is the minor additional right of inspection given in *Lochiatto*" and the cases which have followed it. *In re Grand Jury Proceedings (Worobyzt), supra*, 547 F. 2d at 198. See also *Melickian* v. *United States, supra*, 522 F. 2d at 420 ("minimal showing" required of government to defeat inspection); *In re Grand Jury Proceedings (Katsouros), supra*, 613 F. 2d at 1174 (all circuits agree that a witness can invoke 18 U.S.C. 2515 only if it would not significantly impede the functioning of the grand jury). Indeed, even in those circuits that have declared their intent to follow the procedure outlined in *In re Lochiatto* (in camera inspection followed by release of documents to which the government's claim of secrecy does not apply, see 497 F. 2d at 808), there are suggestions that this "minor additional right" may not always be available.[5] Because the

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[5]For example, contrary to the Ninth Circuit's recent decision requiring disclosure in *In re Grand Jury Proceedings (McElhinney), supra*, there are other Ninth Circuit cases holding that in camera review alone may suffice. See *In re Gordon*, 534 F. 2d 197 (1976); *United States* v. *Canon*, 534 F. 2d 139, cert. denied, 425 U.S. 991 (1976); *Droback* v. *United States*, 509 F. 2d 625 (1974), cert. denied, 421 U.S. 964 (1975). The same is true in the Seventh Circuit. See *In re Special February, 1977 Grand Jury (Pavone)*, 570 F. 2d 674, 677-679, cert. denied, 437 U.S. 904 (1978). See also *United States* v. *D'Andrea*, 495 F. 2d 1170, 1174 (3d Cir.), cert. denied, 419 U.S. 855 (1974).

real difference between the two positions seems relatively minor, the government has in the past not sought review by this Court of those cases adhering to the views espoused in *In re Lochiatto*. We continue to believe that the issue presents no substantial question requiring resolution by this Court in this case.

Petitioner asserts that in any event the reasoning of *Persico* should not apply in criminal contempt proceedings instituted after the expiration of the grand jury's term, since there is then no concern for the delays that a suppression hearing might cause. The court of appeals (Pet. App. 18a-19a), following its decision in *United States* v. *Morales*, 566 F. 2d 402, 406-408 (2d Cir. 1977), properly rejected this argument. There is little to be gained by making a witness's right to examine a wiretap application depend on a fortuity such as the date when he is proceeded against for contempt. Such a policy would only encourage witnesses summoned near the end of the grand jury's term to be relatively more recalcitrant than those called earlier. Cf. *id.* at 408. The proper approach, as the court of appeals recognized (Pet. App. 18a), is to treat the derivative contempt actions as "so intimately connected with th[e] grand jury as to be a 'part of those proceedings.' "

Petitioner also argues (Pet. 20-23) that he should have been entitled to examine the wiretap documents because at trial the government read from the grand jury minutes, which contained information derived from intercepted conversations. What was introduced at trial was not relevant to the contempt charge, however, and was only secondarily relevant to the perjury charge (see Pet. 20 n.15; Pet. App. 19a). Petitioner committed perjury by falsely stating that he had not gone to Cavalieri's social club on May 4, 1978; information about that visit was not derived from the wiretap. In the grand jury minutes petitioner was asked

questions about several things that were said in the intercepted conversations. Petitioner's evasiveness in responding to those questions (see Tr. 88-92, 170-220) allowed the jury to infer an intent to testify falsely about his activities on May 4. There was, of course, other evidence from which the jury could draw the same conclusion.[6]

Under 18 U.S.C. (Supp. IV) 2518(9) the government was required to give petitioner a copy of the court order and wiretap application prior to disclosing the contents of the intercepted conversations in connection with petitioner's perjury charge.[7] Petitioner did not rely on that provision in the court of appeals, which consequently did not address it; nor indeed does he raise it in this Court. But not every violation of Title III requires suppression of wiretap evidence. Cf. *United States* v. *Donovan*, 429 U.S. 413, 432-440 (1977); *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974). And even if one were to suppose that inspection of the court order and supporting documents would show that the wiretap was illegal, it would not afford petitioner a defense to a charge of perjury. "Our legal system provides methods

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[6]Particularly suggestive are the immediate circumstances surrounding the false statement. Petitioner was asked on August 16, 1979, whether he had gone to Cavalieri's club. He concluded: "I am telling you that I possibly, yes, I might have seen [Cavalieri], I might have been with my father, I don't know." The next day petitioner stated that he wanted to change his testimony, which he thought was incorrect. He then said: "I thought about it and I remember that I did not go [to Cavalieri's club] * * *. [T]hat's why I am saying now that I never went to 109th Street" (Pet. App. 12a).

[7]18 U.S.C. (Supp. IV) 2518(9) states in part:

> The contents of any wire * * * communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial * * * unless each party * * * has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72 (1969). See *United States* v. *Wong*, 431 U.S. 174, 178 (1977); *United States* v. *Mandujano*, 425 U.S. 564, 577 (opinion of Burger, C.J.), 585 (opinion of Brennan, J.) (1976); *United States* v. *Knox*, 396 U.S. 77, 81-82 (1969). In any event there is no indication in this case that the wiretap itself was conducted in violation of the Act; the district court came to a contrary conclusion from an in camera inspection of the application and order. Nor did anything in the intercepted conversations have any bearing on the perjury of which petitioner was convicted. Petitioner's unwillingness to respond to questions about those conversations before the grand jury provided a basis at trial for concluding that he had intentionally lied about his activities on May 4, 1978. But since the issue at the perjury trial was petitioner's state of mind before the grand jury—where the wiretaps were properly admitted—it was entirely appropriate to make the jury at trial aware of that fact. Moreover there was ample other evidence from which the trial jury could have reached the conclusion that petitioner had intentionally perjured himself. Under these circumstances further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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